

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Korean Gospel Broadcasting Network)	Facility ID No. 202116
Application for New FM Translator Station,)	File No. BNPFT-20180420AAX
Los Angeles, California)	

MEMORANDUM OPINION AND ORDER

Adopted: November 23, 2020

Released: November 24, 2020

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review (AFR) filed by Korean Gospel Broadcasting Network (KGBN) on March 13, 2020.¹ KGBN challenges the Media Bureau's (Bureau) denial of the Petition for Reconsideration (Petition) it filed in relation to the Bureau's dismissal of its application (Application) for a new cross-service FM translator station at Los Angeles, California (Translator), to rebroadcast Station KGBN(AM), Anaheim, California.² For the reasons set forth below, we dismiss in part and otherwise deny the AFR.

II. BACKGROUND

2. KGBN filed the Application on April 20, 2018. Shortly thereafter, Calvary Chapel of Costa Mesa (CCCM) filed its Petition to Deny.³ CCCM alleged that the Translator would cause interference to listeners of its station—KWVE-FM, San Clemente, California—in violation of section 74.1204(f) of the Commission's rules (Rules).⁴ Accompanying the Petition to Deny were 28 listener complaints and a map showing that the locations referenced in those complaints were within the Translator's proposed 60 dBμ contour.

3. KGBN opposed the Petition to Deny, referencing a rulemaking proceeding (FM Translator Interference Proceeding) the Commission had commenced to consider proposals to streamline the rules relating to FM translator interference and expedite the interference complaint resolution process.⁵ KGBN noted that, among other things, the Commission proposed to establish an outer contour

¹ Application for Review of Korean Gospel Broad. Network, File No. BNPFT-20180420AAX (rec'd Mar. 13, 2020) (AFR).

² *Korean Gospel Broad. Network*, File No. BNPFT-20180420AAX, Letter Order (MB Feb. 20, 2019) (*Reconsideration Decision*).

³ Petition to Deny of Calvary Chapel of Costa Mesa, File No. BNPFT-20180420AAX (rec'd May 8, 2018).

⁴ At that time, section 74.1204(f) provided the Commission would not grant an FM translator application if an objecting party provided "convincing evidence" that the proposed translator station would interfere with the reception of a regularly received off-the-air existing service, even if the proposed facilities complied with the Commission's contour overlap prohibition. 47 CFR § 74.1204(f) (2018). *See also Amendment of Part 74 of the Commission's Rules Concerning FM Translator Stations*, MM Docket No. 88-140, Report and Order, 5 FCC Rcd 7212, 7230, para. 128 (1990), *modified*, 6 FCC Rcd 2334 (1991), *recon. den.*, Memorandum Opinion and Order, 8 FCC Rcd 5093 (1993).

⁵ Opposition to Petition to Deny of Korean Gospel Broad. Network, File No. BNPFT-20180420AAX (rec'd May 16, 2018, referencing *Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, MB (continued....))

limit beyond which listener complaints would not be considered actionable.⁶ Given that adoption of an outer contour limit could—according to KGBN—render the listener complaints submitted by CCCM “not-actionable,” KGBN urged the Bureau to hold the Petition to Deny in abeyance until the Commission issued an order in the FM Translator Interference Proceeding.

4. CCCM replied, arguing that the pendency of the rulemaking proceeding did not “change the fact that on the day Korean Gospel’s application was filed, and today, that application did not and does not comply with Section 74.1204(f).” CCCM also submitted additional and more recent listener complaints to address claims made by KGBN that the majority of complaints submitted with CCCM’s Petition to Deny were too old, and a map showing that the locations referenced in these complaints were within the Translator’s proposed 60 dBμ contour.

5. On February 1, 2019, the Bureau granted the Petition to Deny and dismissed the Application. The Bureau found that CCCM had “demonstrated that there are listeners [to its station] within the [Translator’s] proposed 60 dBμ contour.”⁷ The Bureau acknowledged KGBN’s request that it hold the Petition to Deny in abeyance.⁸ However, it found that “the proposed translator must adhere to the current rules.”⁹ Because CCCM had provided convincing evidence that the Translator would cause interference to the reception of KWVE-FM by that station’s listeners, the Bureau dismissed the Application.¹⁰

6. KGBN then filed the Petition, arguing that the Letter Order was “arbitrary and capricious,”¹¹ and inconsistent with various Commission policy goals, including promoting minority broadcasting and AM revitalization.¹² CCCM opposed the Petition on March 11, 2019.

7. On February 20, 2020, the Bureau denied the Petition. The Bureau rejected KGBN’s argument that its decision was arbitrary and capricious. The Bureau also found KGBN’s argument that grant of the Application would further various Commission policy goals unpersuasive,¹³ and explained that the new FM translator interference rules did not apply to the Application.¹⁴

8. KGBN seeks review of the *Reconsideration Decision*. It repeats its argument that the Bureau’s dismissal of the Application was arbitrary and capricious, and its arguments related to

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Docket No. 18-119, Notice of Proposed Rulemaking, 33 FCC Rcd 4729 (2018) (*FM Translator Interference NPRM*).

⁶ *Id.* at 4740-43, paras. 23-29.

⁷ *Korean Gospel Broad. Network*, File No. BNPFT-20180420AAX, Letter Order, at 2 (MB Feb. 1, 2020).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Petition at 1, 4-5.

¹² *Id.* at 1, 2-4, 6-7.

¹³ *Reconsideration Decision* at 3-4.

¹⁴ *Id.* at 4, citing *Amendment of Part 74 of the Commission’s Rules Regarding FM Translator Interference*, MB Docket No. 18-119, Report and Order, 34 FCC Rcd 3457, 3482, para. 49 (2019) (*FM Translator Interference Order*), *recon. denied*, Order on Reconsideration, FCC 20-141 (Oct. 6, 2020) (*FM Translator Interference Order on Reconsideration*).

Commission policy goals.¹⁵ CCCM opposed the AFR.¹⁶ We consider the KGBN and CCCM pleadings below.

III. DISCUSSION

9. We deny the AFR and uphold the Bureau's rejection of KGBN's arguments that the *Letter Order* was arbitrary and capricious, and inconsistent with Commission policy goals. Specifically, the two Bureau-level cases cited by KGBN purporting to demonstrate that certain FM translator interference complaints had "been put on hold awaiting the outcome of [the FM Translator Interference Proceeding]" are distinguishable.¹⁷ We also uphold the Bureau's finding that it is not appropriate to achieve the minority broadcasting and AM revitalization policy objectives cited by KGBN "in a manner that undermines the incentives of FM translator applicants to propose viable facilities from the start or

¹⁵ AFR at 1, 2-4, 5-6. KGBN further repeats and expands upon an argument made in an untimely pleading that the Bureau dismissed in the *Reconsideration Decision*. *Reconsideration Decision* at 1, n.1. In the dismissed pleading, KGBN had argued that, based on language in the *FM Translator Interference Order*, the Application should be granted. Supplement to Petition for Reconsideration of Korean Gospel Broad. Network, BNPFT-20180420AAX, at para. 6 (rec'd Aug. 13, 2019). We note that KGBN could have filed a Petition for Reconsideration of the *Reconsideration Decision* asking the Bureau to consider how the *FM Translator Interference Order*—which was released before the *Reconsideration Decision* but after the closure of the pleading cycle on the Petition—applied to the Application. That would have been a procedurally proper way of timely raising this issue. See 47 CFR § 1.106(c)(1); *Stolz v. FCC*, 882 F.3d 234, 239 (D.C. Cir. 2018), citing 47 CFR § 1.106(b)(2)(i) and 47 CFR § 1.115(c) ("We have found no FCC rule permitting, let alone requiring, supplemental filings after closure of the pleading cycle. . . . [W]hat the FCC's regulations do say is that a petition for reconsideration is exactly the place in which to raise 'events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission.'").

¹⁶ Opposition to Application for Review of Calvary Chapel Costa Mesa, BNPFT-20180420AAX (rec'd Mar. 30, 2020).

¹⁷ *Reconsideration Decision* at 3, AFR at 1-2. As the Bureau noted, the Petition did not reference any specific FM translator interference complaints that were held in abeyance due to the pendency of the FM Translator Interference Proceeding. *Id.* KGBN seeks to remedy this defect in the AFR, AFR at 5, citing *North American Broad. Co., Inc.*, File No. BLFT-20170608AAP, Letter Order (MB Jan. 10, 2020) (*North American*), and *Habibi's Broad., LLC*, File No. BLFT-20180620AAB, Letter Order (MB Sept. 9, 2019) (*Habibi's*), but it is procedurally barred from doing so now because it did not present this evidence to the Bureau. Accordingly, we dismiss this claim. See 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c). On alternative and independent grounds, we deny this claim on the merits because these two cases are distinguishable from the present case. Unlike the present case, where the decision on the application was preceded by a Petition to Deny, an Opposition, and a Reply, *North American Broadcasting* entailed several supplements to the original Petition to Deny, thus requiring additional time for the Bureau to act on the application and associated interference claims. *North American* at 2 (referring to a "volley of pleadings" on the application). In *Habibi's*, an interference complaint was filed less than 8 months before the new rules took effect, whereas the Application here was filed over 15 months before the new rules took effect. Because the initiation of the KGBN matter preceded the initiation of the *Habibi's* matter by several months, there is nothing arbitrary or inconsistent in the Bureau's decision to act on the KGBN matter before the *Habibi's* matter. Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, to *Habibi's Broad., LLC*, File No. BLFT-20180620AAB (dated Feb. 5, 2019). In addition, we note that both the *North American* and *Habibi's* matters involved claims of actual interference from an existing facility under Section 74.1203(a) while the present case involves claims of predicted interference from a proposed facility under Section 74.1204(f). The Commission has noted that claims of actual interference under Section 74.1203(a) can be "prolonged, contentious proceedings centered around allegations that complainants were not 'bona fide,' that interference locations were not properly identified, that complainants did not cooperate with remediation attempts." *FM Translator Interference NPRM*, 33 FCC Red 4729, para. 7. It is not surprising that these actual interference cases took longer to resolve than the predicted interference case here. In any event, we note that *North American* and *Habibi's* are Bureau-level decisions and thus not binding on the Commission. See *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008)

puts existing stations at risk of losing listeners.”¹⁸ Additionally, the Bureau is under no obligation to withhold the processing of defective applications pending a potential change in legislation or the Commission’s rules.¹⁹

10. We note that the section 74.1204(f) violation need not have resulted in dismissal of the Application. KGBN could have amended its Application while it was pending to address the section 74.1204(f) violation, or it could have filed a corrective amendment after the dismissal of the Application pursuant to the Commission’s *Nunc Pro Tunc* policy.²⁰

11. Finally, we uphold the Bureau’s finding that the new FM translator interference rules do not apply here. As the Bureau noted, the rule changes adopted in the FM Translator Interference Proceeding apply only to applications or complaints that had not been “acted upon” as of the effective date of the new rules.²¹ The Bureau acted upon the Application more than three months before the new

¹⁸ *Reconsideration Decision* at 3-4. KGBN argues that dismissal of the Application “is a slap in the face to the Commission’s historic minority broadcasting policy goals as well as the goals that not only embody the AM Revitalization Proceeding but also fostered the proposed new translator interference policies” proposed in the FM Translator Interference Proceeding. See AFR at 3-4, citing *Report and Statement of Policy Res: Commission En Banc Programming Inquiry*, Public Notice, 44 FCC 2303 (1960); and *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 42 RR 2d 1689 (1978). KGBN does not elaborate on these arguments. However, it appears to rely on the fact that the proposed translator would have rebroadcast the signal of KGBN(AM), and the fact that KGBN(AM) provides programming for the “Christian Korean community.” The Commission, however, does not base licensing decisions on program formats because stations may change their formats at any time. See *Wilfredo G. Blanco-Pi*, Memorandum Opinion and Order, 31 FCC Rcd at 4293, n.16 (2016); *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC.2d 858 (1976). Moreover, the Commission has stated: “While we believe AM revitalization is an important public interest goal, we do not believe it should be achieved in a manner that undermines the incentives of FM translator applicants to propose viable facilities from the start or puts existing stations at risk of losing listeners.” *Emmanuel Comm’ns, Inc.*, Memorandum Opinion and Order, 34 FCC Rcd 9294, 9297, para. 7 (2019).

¹⁹ See *Iglesia Pentecostal Cristo Missionera*, Memorandum Opinion and Order, 23 FCC Rcd 2230 (2008) (denying request to keep a defective LPPM application pending until Congress addressed domestic third-adjacent channel protection standard).

²⁰ *Reconsideration Decision* at 4. See also *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 49 Fed. Reg. 47331 (Dec. 3, 1984) (*Nunc Pro Tunc* policy). KGBN dismisses these options—claiming any amendment “would have reduced the translator’s proposed service area so significantly that service to Koreatown would have been entirely eliminated.” AFR at n.2. However, if the Application cannot be amended to eliminate predicted interference issues, the solution is not for the Commission to grant the Application.

²¹ *Id.* at 4, citing *FM Translator Interference Order*, 34 FCC Rcd at 3482, para. 49. The Commission recently affirmed its “holding in the [*FM Translator Interference Order*] that rules adopted therein would be applicable to any pending applications or complaints that had not been acted upon as of the date the new rules became effective.” *FM Translator Interference Order on Reconsideration* at 12, para. 23.

FM translator interference rules were adopted and more than six months before they became effective.²² Accordingly, the new rules do not apply.²³

IV. ORDERING CLAUSES

12. For the reasons set forth herein, **IT IS ORDERED THAT**, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended,²⁴ and sections 1.115(c) and (g) of the Commission's rules,²⁵ the Application for Review filed by Korean Gospel Broadcasting Network on March 13, 2020, **IS DISMISSED IN PART AND OTHERWISE DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²² While the Commission did not further elaborate on what it meant for an application to have been “acted upon,” it did so in a subsequent Report and Order, citing to the *FM Translator Interference Order*. See *Amendments of Parts 73 and 74 to Improve the Low Power FM Radio Service Technical Rules Modernization of Media Regulation Initiative*, Report and Order, 35 FCC Rcd 4115, 4134 para. 48, n. 129 (2020) (explaining that “Applicants that have not been the subject of any staff decisions as of the effective date of the rules adopted in this Report and Order will be decided based on the new rules”) (citing the *FM Translator Interference Order*). Indeed, the phrase “acted upon” is commonly understood to distinguish between applications or pleadings that are pending without a decision and those that have been granted, dismissed, or denied even if not yet final, as reflected in Commission rules and agency decisions. See, e.g., 47 CFR § 1.102(b) (“actions taken” pursuant to delegated authority are “effective upon release,” even if subject to further review by the Bureau or Commission); 47 CFR §§ 73.3562 (discussing that the Chief of the Media Bureau may “act[] upon” an application by granting it), 73.3566-68 (dismissal of applications in certain circumstances); *Jet Fuel Broad. Co.*, Letter Order, 24 FCC Rcd 13668, 13670 (MB 2009) (noting that actions with respect to applications include grant, dismissal and denial). See also 47 CFR § 73.3561 (upon acceptance of an application, the complete file is reviewed by the staff and its recommendations are placed on the Commission’s agenda “except where the application is acted upon by the staff pursuant to delegated authority”).

²³ To the extent that KGBN argues that its application does not qualify as “acted upon” because it has not yet exhausted the administrative appeals process, see *supra* note 15, this argument is procedurally barred because it was not presented to the Bureau. Accordingly, we dismiss this claim. 47 USC § 155(c)(5); 47 CFR § 1.115(c). On alternative and independent grounds, we deny this claim on the merits because it is not a reasonable reading of the language in the *FM Translator Interference Order*. See 47 CFR § 1.102(b)(1) (unless otherwise ordered, an “action[] taken” by delegated authority becomes effective upon release of the document or release of a public notice announcing the action taken, even if subject to further review by the Bureau or Commission). There is nothing in the *FM Translator Interference Order* to suggest that the Commission intended the Bureau to abandon its original decision and begin the decisional process anew under such circumstances. See, *supra*, n.17.

²⁴ 47 U.S.C. § 155(c)(5).

²⁵ 47 CFR § 1.115(c), (g).